

ORIGINAL
STATE OF INDIANA

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INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE INVESTIGATION)
ON THE COMMISSION'S OWN MOTION)
INTO ANY AND ALL MATTERS RELATING)
TO LOCAL TELEPHONE EXCHANGE)
COMPETITION WITHIN THE STATE)
OF INDIANA.)

CAUSE NO. 39983

ORDER ON RECONSIDERATION
AND RESALE ISSUES

APPROVED:

DEC 18 1996

BY THE COMMISSION:

G. Richard Klein, Commissioner
Keith L. Beall, Administrative Law Judge

On June 15, 1994, this Commission initiated on its own motion an investigation into matters relating to local telephone exchange competition within the State of Indiana. Following several proceedings in this Cause, the Telecommunications Act of 1996 ("TA96" or "Act"), was signed into law on February 8, 1996. Following the enactment of TA 96 several hearings were held and testimony and comment received from the various parties. Based upon those proceedings and evidence the Commission issued an Interim Order on Bundled Resale and Other Issues on July 1, 1996 ("first Interim Order on Resale"). Since the issuance of the first Interim Order on Resale, the Commission has held additional hearings and meetings as well as received additional evidence and comments from of the parties.

An evidentiary hearing was held beginning on July 15, 1996 pursuant to proper notice. This evidentiary hearing was continued with the consent of all parties to August 22, 1996. The following Respondents appeared by counsel and participated in the evidentiary hearing as well as the subsequent attorneys conference of August 22, 1996: Smithville Telephone Company; the Indiana Exchange Carriers Association (INECA); the Competitive Telephone Association ("CompTel"), the Indiana Cable Association ("Cable Association"), Telecommunications Group, Indianapolis, Inc. ("TCG"), Time-Warner Communications, Inc. ("Time-Warner"); the TDS Companies, Inc. ("TDS"); WorldCom, Inc. d/b/a LDDS WorldCom ("WorldCom"); MFS Intelnet of Indiana, Inc. ("MFS"), MCI Telecommunications Corp. ("MCI"), Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana ("Ameritech"), United Telephone Company of Indiana ("United"), Sprint Communications Company ("Sprint"), AT&T Communications Corp. ("AT&T"), Northwestern Indiana Telephone Company ("NITCO"), GTE North Incorporated and Contel of the South Inc. ("GTE"), Sprint Cellular Company (Westel/Indianapolis Company, Bloomington Cellular Telephone Company, Inc., Indiana Cellular Corporation, [all doing business as "Cellular One"]), and the United Senior Action and Citizens Action Coalition of Indiana, Inc., and the American Association of Retired Persons (AARP). The Office of Utility Consumer Counselor (OUCC) also appeared and

participated.

1. Requests for Reconsideration and Clarification. Following the issuance of the first Interim Order on Resale, four requests for reconsideration or clarification were received by the Commission from: AT&T, CompTel, MCI, and GTE. Following these requests, Ameritech Indiana filed its "Brief on Individual Customer Arrangements". All of the above requests for reconsideration, clarification, and the Ameritech Indiana responsive filing appear in the following words and figures, to-wit:

[H.I.]

The filings from CompTel and MCI were joinders in and concurring with the AT&T comments. Therefore, this Commission has been presented with two main requests for reconsideration and clarification. These two requests are the AT&T filing and the GTE filing which will be addressed in turn.

(a.) **AT&T's Request.** AT&T contends that TA 96 requires that all telecommunications services offered by an incumbent local exchange carrier ("ILEC") must be resold. Based upon this premise AT&T cites 3 specific areas where reconsideration and/or clarification of our first Interim Order on Resale is appropriate. AT&T argues that because the federal Act requires that all retail services currently being offered by an incumbent LEC ("ILEC") are required to be resold, the prohibited resale services in our first Interim Order on Resale, namely: grandfathered, joint tenant, promotional offerings and specific contract type offerings, should be made available for resale. AT&T complains that by prohibiting the resale of grandfathered and joint tenant services would be anti-competitive and would "perpetuate the monopolistic practice of keeping customers captive." AT&T Motion, at p. 3.

In its specific discussion about grandfathered services, AT&T does recognize that some practical limitations may need to be placed on the resale of grandfathered type services and cites an Illinois Commerce Commission ("ICC") Order as an acceptable guide for such limitations. The ICC decision requires the resale of similar types of grandfathered services but limits the sale of the services to those customers currently taking such grandfathered services.

AT&T proposes similar limitations to the current customer taking joint tenant services as well.

The next area presented by AT&T for reconsideration is the first Interim Order on Resale limitations on resale of promotional offerings. The request by AT&T on this specific issue is for clarification of the first Interim Order's language and the practical application. AT&T indicates that there is no definition of promotional offerings nor any time or other limitations in our Order. AT&T submits that because of the limitation of the "price floor" requirement established in our first Interim Order on Resale

on alternate local exchange carriers ("ALEC"), an ILEC could undercut the ALEC's price. AT&T proposes that we prohibit ILECs from selling below the wholesale price offered to ALECs (the ALEC price floor) as a way to resolve this situation.

AT&T's next argues that contract services must also be resold and discusses the potential harm which may come about if such services are not required to be resold. AT&T focuses its discussion on the potential that an ILEC could abuse reduced regulation and utilize contract offerings at prices below the wholesale price floor. AT&T claims clarification is needed to define the scope of this prohibition on the resale of contract arrangements especially in light of the Commission's imposition of the price floor on ALECs. AT&T also describes the price advantage an ILEC may have using a contract arrangements (CSO's, ICA's and ICB's) by being able to price below the wholesale price. The Commission is administratively aware of a current proceeding under a separate cause where such a claim has been made and certain similar circumstances alleged. See Cause No. 40612.

Finally, AT&T seeks further clarification of the limitation language contained in our first Interim Order on Resale regarding service territory. More specifically, AT&T raises concerns about certain language which AT&T claims limits the ability of an ALEC to only be able to "resell an ILEC's 'retail local services [in] the underlying ILEC provider's service territory.'" AT&T Motion, (citing the first Interim Order on Resale, p. 27), at 9. AT&T requests that the Commission clarify this portion to require an ILEC to allow the ALEC to resell EAS services to those customers who are otherwise able to obtain EAS service from the underlying ILEC, regardless of whether the customer is inside or outside the ILEC's service territory. AT&T claims this clarification is needed to prevent an ILEC from offering local service that is broader in scope than what an ALEC is able to offer.

(b.) GTE's Request.

In GTE's Request for Reconsideration and Clarification, GTE seeks additional hearing or opportunity to be heard on several different topics. GTE specifically requests that the Commission set the issue for bundled wholesale rates for additional proceedings to allow GTE and other parties the ability to offer additional testimony and examine other parties witnesses. More specifically, the request falls into the following areas:

- GTE seeks clarification as to whether wholesale tariffs are the only way they or other incumbent LECs may offer service or whether the ILEC's can continue to negotiate interconnection arrangements.

- GTE seeks clarification as to the "avoided cost" definition of Section 252(d)(3).

- GTE argues that the Commission's number portability task force should be allowed to consider cost recovery and allocation of

costs.

- GTE argues that the Commission should allow negotiation of electronic interface and systems specifics as well as agreed upon compensation arrangements between interconnecting local telephone service providers.

- GTE seeks clarification that the Commission's discussion in the "Miscellaneous Issues" section in the first Interim Order on Resale with the Commission references to Cause No. 39705 and the implications with TA96 do not apply to GTE.

Finally, GTE requests the Commission make a preliminary finding that GTE's cost information is confidential.

(c.) Ameritech Indiana's Response.

Ameritech Indiana in its Response limits its discussion to those issues raised by AT&T, CompTel and MCI relative to the individually negotiated customer arrangements ("ICA's") customers specific offerings ("CSO's") and individual case basis contracts ("ICB's"). Ameritech Indiana contends that these are not and should not be subject to the resale obligations imposed upon ILEC's under TA96. Ameritech Indiana supports its position by: 1) citing and concurring with the Commission's first Interim Order on Resale discussion indicating that these services are not generally available and, 2) the language in TA96 which requires that ILEC's resell only those retail services made available directly to the public. See Section 251(c)(4)(B). Ameritech argues that because an ICA is limited to a particular subscriber and that subscriber's needs, by definition, that unique "subscriber-class" would fall into the cross-class restrictions specifically provided for in Section 251(c)(4)(B). Ameritech Indiana's comments are silent on those allegations presented by AT&T, CompTel and MCI of the potential for abuse of these unique contract arrangements.

2. Discussion and Findings.

We will begin our discussion by addressing those issues raised and then respond to each in the order set forth above. Before doing so, though it is necessary to discuss the Federal Communications Commission's ("FCC") First Report and Order ("FCC Order") in Docket 96-98, dated August 8, 1996. This FCC Order deals with many of the issues presented for reconsideration and was issued after our first Interim Order on Resale and the requests for reconsideration were filed in the instant cause. Where appropriate, we will cite to any applicable FCC Order language which will influence or even control our position on an issue.

(a.) Grandfathered and Joint Tenant Service. First, with regard to the grandfathered and joint tenant services, the Commission believes it is appropriate to require that these services be offered for resale with limited restrictions. See FCC

Order at para. 968. This determination is not only based upon the comments of the parties but also the clear directives in the FCC Order that restrictions on resale of joint tenant services are presumptively unreasonable. See FCC Order at para 939. We do find that certain limitations are reasonable for grandfathered services and not contrary to the directives of the FCC Order. An ALEC seeking to provide grandfathered services should be limited to resell only such grandfathered services to those customers who are currently receiving the grandfathered services from the ILEC.

We find no similar limitations are appropriate nor justified for joint tenant service and that joint tenant services should be made available for resale consistent with the methodology provided for herein.

(b.) Promotional Offerings. AT&T, CompTel and MCI seek additional clarification regarding promotional offerings. Upon further consideration and a review of the FCC Order, we find that promotional offerings are unique arrangements not falling neatly into the "retail service" definition of the Act. As determined by the FCC promotional offerings are those services which are made for periods of up to 90 days at special rates. This then creates a potential conflict between the need to encourage promotional arrangements as determined by the FCC and balance this with the concerns raised by competitors such as AT&T, MCI and CompTel in their respective Motions. We do find that the concerns raised by AT&T regarding promotional offerings have merit. AT&T has asserted that an ILEC who has the ability to quickly change its promotional offering would likely have an advantage. We agree this is possible but we do not agree with the AT&T proposed resolution of this situation. We believe the appropriate resolution is to require an ILEC subject to 251(b)(1) to make any promotional offering of 90 days' duration or less (as defined in the FCC Order) available to any ALEC local reseller at the same rate the underlying ILEC charges its own end user customers, for the promotional offering(s) in question, consistent with Section 251(b)(1) of the Act. We further find that the ILEC should provide 2 days written advance notice of the terms and conditions of any promotional offering prior to the effective date for that promotion to any certificated ALEC local reseller within the state of Indiana.

We further find that the additional requirements of 251(c)(4) and 252(d)(3) are also applicable for promotional offerings of longer than 90 days' duration and to consecutive promotional offerings of 90 days' or less duration which occur subsequent to the first in a series of promotional offering of 90 days' or less duration, as discussed in paragraph 950 of the FCC's Order. In such extended promotional offering cases, the underlying ILEC shall be subject to the interim proxy wholesale discount set forth in this Order or in other applicable IURC Orders or Rules, and to such permanent wholesale rates and discounts as this Commission may from time to time hereafter establish.

(c.) CSO, ICA and ICB. The final area of contention among the parties regarding resale is whether or not CSOs, ICAs, and ICBs should be the subject of resale and wholesale tariffs. Following a review of the comments received from the parties, the Commission makes the following findings. Based upon the obligations under Sections 251(b)(1), 251(c)(4), 252(d)(3) and the directives of paragraph 948 of the FCC Order, this Commission determines that any ILEC offering Customer Specific Offerings (CSOs), Individual Customer Arrangements (ICAs), or Individual Case Basis arrangement (ICBs) are required to make these available for resale to a certified ALEC.

(d.) Service Territory - Calling Scope. The final area in which AT&T seeks clarification is the language contained in the first Interim Resale Order that ALEC resell in an ILEC's "service territory" with no corresponding requirement that the ILEC make available, on a bundled basis, all similar EAS calling scopes as well. The Commission finds that it is necessary to clarify this portion of our prior Order. First, it should be noted that this section of the first Interim Order on Resale places obligations on both the ILEC and ALEC. With regard to the ILEC's responsibilities, the resale of local service to an ALEC should include the ability of the ALEC's customer to complete calls in the same fashion and same calling scope as the underlying, similarly situated ILEC customers are able to do including non-toll, EAS calling. Therefore, the customer should be able to complete a non-toll call in the same fashion whether the customer is a customer of the ILEC or of the ALEC.

The current obligations imposed upon the ALEC by this clarification is that the ALEC may not offer local service beyond the bounds (calling scope) currently imposed upon the ILEC. More specifically, an ALEC local reseller cannot expand the local calling scope beyond that allowed to the ILEC without imposing technical, economic, and/or regulatory costs upon the ILEC. Similarly, the ILEC must incorporate and make available the local calling scope it offers to a particular customer in that particular customer's location to the ALEC reseller.

(e.) GTE's Concerns. The main theme raised by GTE in its Request for Reconsideration and Clarification is its ability to offer additional evidence and have adequate opportunity to present such evidence on its wholesale tariffs. GTE also requests a hearing and an opportunity to be heard on these issues. As discussed below, the Commission is, in fact, establishing a process which will give GTE and any other interested party an opportunity to present additional evidence on the final resale tariffs. Therefore this portion of GTE's request is granted.

The next area of concern raised by GTE seems to contradict its first in that GTE now claims that the Commission cannot require the tariffing of wholesale rates because it conflicts with TA96. GTE

argues that the Act gives any ILEC or ALEC the freedom to negotiate terms of interconnection and because of this, the tariffing process is inconsistent and, GTE claims, prohibited by TA96. The Commission disagrees with GTE's assertion and finds that the tariffing process is consistent with several portions of the Act as well as furthering competition in the state of Indiana. As discussed in other cases now pending before the Commission, wholesale tariffs promote competition by notifying any interested ALEC of the terms with which it can buy services. However, this is not intended to be the exclusive means for an ALEC to purchase services on a wholesale basis from an ILEC. We recognize that the Act does provide other ways for telephone service providers to obtain services for resale. We are not in any way attempting to prevent any parties from negotiating differing terms or conditions.

To the contrary, we encourage such negotiated arrangements. Under Section 251(c)(4) of TA 96, an ILEC has an affirmative obligation to offer services for resale. There are a number of ways under the Act for an ILEC to accomplish this. As noted above, the Act also allows this Commission to further encourage competition beyond what is required in TA96. We believe the requirement that ILEC file wholesale tariffs is in furtherance of competition and in addition to the requirements of the Act and not in contradiction to those terms. Parties are still free to negotiate any terms and conditions of resale, including wholesale discounts and rates, and present these terms and conditions to the Commission for consideration and review pursuant to Section 252, as GTE hopes. The Commission reaffirms its language in the first Interim Resale Order, at page 39, on this point wherein we stated that the parties are free to continue to negotiate under the Act. This latter point addresses the fourth issue raised by GTE as to whether or not the parties can continue to negotiate wholesale bundled rates. Obviously the parties can do this and the Commission would encourage the parties to do so if they choose.

The next area of concern raised by GTE is its allegation that the IURC is somehow requiring GTE to offer at wholesale its services below cost. Because GTE is seeking clarification and reconsideration of our July 1, 1996 Order, we note that Order did not make any determinations on costs. However, we are making certain determinations in this Order relative to "costs that will be avoided" which we believe are required by and consistent with the process outlined in Section 252 (d)(3) of TA96. We are specifically directed to determine wholesale rates by removing certain costs "that will be avoided" from retail rates. We further note that we are providing GTE an additional opportunity by holding further proceedings in this matter for determination on the permanent wholesale tariff levels. GTE will then be free to offer any evidence it believes is necessary to allow this Commission to make a final determination under Section 251 (b) and (c) relative to removing costs "that will be avoided" from the retail rates to determine the applicable wholesale discount(s). As we stated

previously in our July 1, 1996 Order in this Cause, the Commission has little discretion in this process of determining wholesale rates. The Act says what it says and we must abide by its terms.

The next area of concern raised by GTE is our limitation placed upon the Number Portability Task Force's scope of consideration. GTE argues that this Number Portability Task Force should be allowed to consider cost recovery and cost allocation issues. We find no basis at this time to expand the scope of the Number Portability Task Forces charge nor are we persuaded by GTE's comments. We therefore deny GTE's request.

GTE next complains that our July 1, 1996, Order improperly creates a burden on the ILECs to make their operating systems available to competitors [GTE petition, at page 19]. The FCC Order deals directly with this concern by requiring ILECs to making their systems available and having a plan in place by January 1, 1997, to accomplish this. Additionally, GTE has presented a solution to these issues, and we have previously addressed this issue in the AT&T/GTE arbitration matter in Cause No. 40571-INT 02. Considering both the FCC Order and our recent arbitration Order in Cause No. 40572-INT 02, this issue now appears moot.

3. INTERIM WHOLESALE DISCOUNTS.

The Commission has received testimony and comments from the many interested parties in this Cause indicating how they believed this Commission should proceed with the wholesale pricing process under TA 96. Based upon the Commission's review of these comments as well as other interrelated causes now pending before the Commission, the Commission finds as follows: the Commission determines that it is appropriate to make specific wholesale discount determinations in this Order on an interim basis subject to a true-up following further proceedings and a final determination of the appropriate permanent wholesale discounts and rates for both Ameritech Indiana and GTE. Based upon the information provided by the parties in this instant case and the proposed wholesale tariff filings and information provided to this Commission in this and other pending cases, the Commission herein finds and determines that an appropriate, across-the-board wholesale discount, on an interim basis subject to true-up for Ameritech Indiana is 21% and for GTE is 17%. These interim discounts from the retail levels are consistent with and supported in part by our determinations in Cause Nos. 40571-INT-01 and 40571-INT-02. As noted above, these across-the-board interim discounts should be applied to any and all retail services now currently being offered by both Ameritech Indiana and GTE, including, but not limited to: grandfathered and joint tenant services; CSO, ICA, and ICB contractual arrangements; with the terms and conditions provided for herein above. We find that Ameritech Indiana and GTE should each file in this cause its respective interim wholesale tariff(s) [and/or catalog(s), in the case of Ameritech] reflecting the applicable wholesale discount within thirty (30) days.

The Commission also finds that because the costing issues for Ameritech Indiana and GTE are so different and unique it is appropriate to establish separate proceedings to examine their respective "costs that will be avoided" and to set the corresponding wholesale discounts and rates. Therefore, the Commission directs the presiding administrative law judge in this Cause to have opened two new causes and begin proceedings in each regarding the permanent wholesale discounts and rates discussed above for, at a minimum, all the above noted services for Ameritech Indiana and GTE, immediately. The Commission will thereafter notice and hold a preliminary/prehearing conference to establish a procedural schedule and other procedural matters for the processing of the permanent, wholesale discounts and rates which will ultimately be determined and approved by this Commission for Ameritech Indiana and GTE, respectively, in these two, new causes. Any interested party should file for intervention in either or both cases showing good cause why each should be allowed to participate pursuant to our rules and procedures.

4. MISCELLANEOUS ISSUES

There are several remaining issues which need to be addressed by this Commission relative to a transition to local telephone exchange competition. One major item provided for under the federal Act is the issue of intrastate universal service and how this process should be administered. The Commission recognizes this as a formidable task and believes it would be appropriate to establish a separate Cause to allow any issues relative to intrastate universal service to be raised and considered. Because of the magnitude of the issues involved with universal service and access charge reform, the Commission further finds it appropriate to establish and begin a process dedicated exclusively to these matters. Accordingly, the Commission herein finds that a separate Cause should be initiated to address universal service issues, access charge reform and other related, miscellaneous issues. We preliminarily find and determine that such a Cause should be processed using the Executive Committee approach. Any party interested in participating in the discussions and forming of issues and recommendations should intervene in this Cause which will be individually opened and noticed as required by law. Any party interested in universal service issues should file a Petition to Intervene following due publication of the location, date and time of a preliminary/prehearing conference. The Commission is tentatively planning on having the Chair of the prior Executive Committee process in this Cause, Paul Hartman, act as Chairman in this universal service proceeding as well. Any parties desiring to participate in this Cause should file its request for intervention by counsel prior to the preliminary/prehearing conference.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION, that:

1. The Commission herein determines that grandfathered

services; joint tenant services; promotional offerings; and CSO, ICA and ICB services all should be made available for resale by any ILEC where such services are being offered, subject to the findings contained in this Order.

2. That an appropriate interim level of discount from the retail service rates for Ameritech Indiana and GTE are twenty one percent (21%) and seventeen percent (17%) respectively, subject to true-up and further individual proceedings to be established for Ameritech Indiana and GTE, consistent with our determinations set forth in Finding Paragraph 3 above.

3. The Commission directs Ameritech Indiana and GTE to file wholesale tariffs within 30 days from the date of this Order for each retail service it currently and hereafter offers calculated consistent with our determinations set forth in Finding Paragraph 3, and as may later be determined in the further proceedings provided for herein. Such tariffs shall be effective upon review and approval of the Commission Staff.

4. The Commission directs the presiding Administrative Law Judge to have opened a cause to address universal service issues, access charge reform and other related, miscellaneous issues, and within a reasonable time thereafter to notice a preliminary and prehearing conference.

5. This Order shall be effective on and after the date of its approval.

MORTELL, KLEIN AND ZIEGNER CONCUR:
HUFFMAN AND SWANSON-HULL NOT PARTICIPATING:
APPROVED:

DEC 18 1996

I hereby certify that the above is a true and correct copy of the Order as approved.



Executive Secretary to the Commission